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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.....

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Fred J. Howarth for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division One, respectfully shows to the Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This Petition Presents Facts Disclosing a Failure and Refusal by the State of California to Give Full Faith and Credit to a Final Judgment Duly Rendered and Existing in the State of Utah, and Facts Showing a Denial by the State of California to Your Petitioner of Rights Guaranteed to Him Under the Fourteenth Amendment to the Constitution of the United States.

Respondent brought an action to recover $2640 alleged to be due under a "Property Settlement and Separation Agreement." Her complaint was entitled "Complaint for Money Due Under the Terms of Written Contract." [R. 1.]

The evidence at the trial disclosed: That on July 3, 1941, respondent and your petitioner were husband and wife [R. 24]; that said agreement contained recitals that they were then living apart, that they were "mutually desirous of effecting a property settlement and separation agreement" [R. 25]; that said agreement after making provisions for the "custody and control" of the minor children of the parties [R. 28] and for their education and support [R. 28], set forth a covenant in Paragraph 12 thereof whereby petitioner agreed to pay the sum of $35.00 weekly to respondent [R. 29] which was followed by an express declaration that "The weekly payments provided by Paragraph 12 are for the support of the wife" [R. 30] and that they were "not . . . assignable" by her [R. 30]; that other paragraphs provided that said payments were to be made during the life of the

wife, if she did not remarry [R. 29], and that the husband's estate would be liable for such payments after his death if she remained unmarried [R. 30]; that subsequently and on June 2, 1943, your petitioner was awarded an interlocutory decree of divorce in the District Court of the Third Judicial District, Tooele County, Utah [R. 61], which decree became final six months thereafter [R. 61]; that a copy of said "Property Settlement and Separation Agreement" had been attached to petitioner's complaint in said action and by reference made "a part of . . .(said) complaint" [R. 48]; that respondent entered her written appearance in said action whereby she admitted service of said complaint upon her and waived time to answer and consented to the matter being heard as a default. [R. 55.]

The evidence further disclosed that the Utah Court made written Findings of Fact [R. 58, 59, 60], and among other things, recited that petitioner was entitled to a divorce because of the acts of cruelty complained of [R. 59] and that the said agreement ". . . attached to the complaint herein . . . is by reference made a part of these findings of fact" [R. 59]; that the Court found "that such agreement is just and proper in its terms" [R. 59] and that although petitioner was a "fit and proper person to be awarded the care and custody" of the child that was still a minor that for the "present time said child should remain with her mother." [R. 59.]

The evidence further disclosed that the Conclusions of Law signed by the Utah Court provided that said agreement was "conformed and approved" [R. 60] and that the said interlocutory decree, after awarding a divorce to petitioner subject to the provisions of the Utah statute

as not being final and absolute until six months later, concluded with the following recital:

> "2. That the property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved." [R. 61.]

At all times during the trial petitioner objected that the Court lacked jurisdiction of your petitioner and of the cause of action [R. 75], as the contract under which recovery of the support payments was sought was incorporated in the Utah decree and had merged therein and that the contract had become superseded by the decree and that the sole obligations of petitioner thereafter imposed were not those imposed by contract but were those imposed by decree and that the sole remedy of respondent was obtainable only through an action brought on the Utah decree. [R. 76.]

The trial court overruled the contentions of your petitioner [R. 78] and made a finding that the sum of $2640 "remained due, owing and unpaid . . . under and by virtue of the terms of said 'Property Settlement and Sepation Agreement.'" [R. 34.]

The trial court then proceeded to interpret and construe the decree of the Utah Court in accordance with the law of California and in error then drew the legal conclusion that ". . . the Property Settlement and Separation Agreement . . . was not by said Court (Utah), in said action, incorporated in nor made an operative part of the decree of divorce therein rendered." [R. 35.]

The faulty reasoning underlying such error appears in the next conclusion of the trial court, for notwithstanding

the clear and positive declaration of the parties set forth in the Property Settlement and Separation Agreement that "The weekly payments provided by Paragraph 12 are for the support of the wife . . ." [R. 30] it is there stated: "That said payments were not in the nature of alimony, but were by way of property settlement." [R. 35.]

Judgment was entered in the sum of $2640 in favor of respondent and against your petitioner. [R. 37, 38.]

Your petitioner appealed from the judgment of the trial court to the District Court of Appeal, Second Appellate District, State of California, which Court, on the 18th day of August, 1947, rendered its decision affirming the judgment of the trial court [R. 82-94]; that on the 16th day of October, 1947, and within the time provided under the laws of the State of California, your petitioner filed his petition in the Supreme Court of the State of California, praying that a hearing be granted in said Court after the decision of the said District Court of Appeal, which petition was denied by said Supreme Court on the 16th day of October, 1947, two of the Justices dissenting. [R. 96.]

The said District Court of Appeal also construed and interpreted the Utah decree and in error held that, because said decree could not in its opinion be enforced "by contempt proceedings" [R. 87] and "did not order either party to do anything with respect to the agreement" [R. 87], and because "the husband was not ordered to pay the wife the sum specified in the agreement" [R. 87] that said Property Settlement and Separation Agreement had not merged in said decree. The said Court, further construing the Utah decree, in error held that said decree is

"not only legally insufficient to warrant the docketing of any money judgment against the plaintiff, but is wholly insufficient to support contempt proceedings . . ." [R. 89.] Said Court also in error held that the "duty or obligation imposed upon the plaintiff in the Utah divorce action was not at all ascertainable from the decree itself . . ." [R. 89.] The said Court then proceeded, without any citation of authority, to declare that petitioner's "contention that he may not be deprived of the right to have the support provisions of the Utah Court decree modified as provided by the laws of the State of Utah without denying to him the rights guaranteed him by the provisions of section 13, article I of the Constitution of the State of California and by subdivision 1 of the Fourteenth Amendment to the Constitution of the United States, "cannot be sustained." [R. 90.] The said Court then noted that "it is true, as urged by appellant, that section 1212, Compiled Laws, 1907, of the State of Utah, confers upon the courts of that state powers in reference to support provisions set forth in a divorce decree similar to those provided in section 139 of the Civil Code of California . . ." but said Court declared that said sections were dependent upon support provisions being incorporated in the decree. [R. 90.] Finally, the Court in error construed the Utah decree not under the laws of Utah but under the alleged authority of *Parker v. Parker*, 193 Cal. 478, 225 Pac. 447, so as to establish that the legal effect of the words "the weekly payments provided by paragraph 12 are for the support of the wife" to mean

that they were not for that purpose at all but that "it was an award to her of a life annuity so long as she did not remarry, given to the wife as part of a property settlement contract." [R. 91, 92.]

PETITIONER'S CONTENTIONS.

That the decision of the District Court of Appeal construes the decree of divorce granted to petitioner in the State of Utah contrary to the express provisions of both the laws of Utah and of California in declaring that the Property Settlement and Separation Agreement providing for payments "for support of the wife" should be construed as not providing for payments for the support of the wife but, on the contrary, as being ". . . an award to her of a life annuity so long as she did not remarry, given to the wife as part of a property settlement contract" [R. 91, 92], notwithstanding that the Utah Court incorporated in its decree an express declaration "that the property settlement and agreement . . . is hereby confirmed and approved." [R. 61.] Petitioner contends that he has thereby been deprived of the right to have the support provisions of the Utah decree modified from time to time as provided by Section 1212, Comp. Laws, 1907, of the State of Utah, thus denying to him rights guaranteed him by the Constitution and laws of the State of Utah and by the provisions of Section 13, Article 1, of the Constitution of the State of California and by subdivision 1 of the Fourteenth Amendment to the Constitution of the United States. [R. 90.] Petitioner further contends that the decision of the said District Court of

Appeal is erroneous in that it fails to give full faith and credit to the divorce decree rendered by the State of Utah, as provided by the provisions of Article IV, Section 1, of the Constitution of the United States.

Respondent's Contentions.

Respondent contended in the trial court and in the District Court of Appeal that the Property Settlement and Separation Agreement containing express provisions for the "support of the wife" and for the maintenance and education of the children of the parties was not in its entirety incorporated in the decree and, consequently, it was not wholly or in part merged in the decree notwithstanding the fact that the Utah Court expressly made said agreement a part of its Findings of Fact and provided in its judgment that said agreement was thereby confirmed and approved, which contention was predicated in great part upon respondent's belief that the Utah decree was wholly insufficient to support contempt of court proceedings under the laws of the State of California. Respondent further contended that said decree should be construed under the authority of *Parker v. Parker,* 193 Cal. 478, as providing for a life annuity to her rather than for payments "for the support of the wife" as expressly declared in said decree. The said contentions of your peitioner were all overruled and denied by the trial court and by the District Court of Appeal and said contentions of respondent were all sustained by the trial court and the District Court of Appeal.

B.

BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW THE JUDGMENT.

1. Statutory Provisions.

The statutory authority believed to sustain the jurisdiction of the Supreme Court of the United States to issue a writ of certiorari in the cause is Judicial Code, Section 237(b), as amended February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937; January 31, 1928, Chap. 14, Sec. 1, 45 Stat. 54, and April 26, 1938, Chap. 440, 45 Stat. 466 (U. S. C. A., Title 28, Sec. 344).

2. Date of Judgment.

The decision of the District Court of Appeal sought to be reviewed was rendered on the 18th day of August, 1947. [R. 82.] Petitioner did not file a petition for rehearing but did file, within the time allowed by the "Rules on Appeal" governing petitions for hearing in the Supreme Court of the State of California following decision by the District Court of Appeal, a petition for a hearing in the Supreme Court of the State of California, which petition was considered by the Court and denied by it on the 16th day of October, 1947. [R. 96.] The judgment then became final. A petition for a writ of certiorari presented to this Honorable Court within three months thereafter is in time.

American Ry. Exp. Co. v. Levee, 263 U. S. 19, 21, 44 S. Ct. 11, 68 L. Ed. 140.

3. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

The Refusal of the California District Court of Appeal to Give Full Faith and Credit to the Judgment of the Utah Court Because of Its Nature Is a Ruling Upon a Federal Right Subject to Review by This Court.

"The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right and the sufficiency of the grounds of denial is for this court to decide. *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 431, 88 L. Ed. 149, 157, 64 S. Ct. 208, 150 A. L. R. 413, and cases cited."

Barber v. Barber, 323 U. S. 77, 89 L. Ed. 82.

II.

"The United States Supreme Court Is the Final Arbiter of Questions Arising Under the Full Faith and Credit Clause."

Morris v. Jones, U. S. S. C. Adv. Op., Vol. 91, No. 6, pp. 399, 403;

Williams v. No. Carolina, 317 U. S. 287, 302.

III.

The Supreme Court of the State of California Having Refused to Grant a Hearing Therein, the Judgment of the District Court of Appeal of the State of California Is a Final Judgment.

The existence of jurisdiction is to be tested by the substantial operation of the judgment.

United States v. Thompson, 251 U. S. 407, 412, 64 L. Ed. 333, 341.

IV.

Certiorari and Not Appeal Is the Correct Procedure Under the Facts Presented Here.

"Certiorari and not appeal is the proper method of obtaining a review of the state court's decision by the Supreme Court of the United States on the ground that full faith and credit has not been given to a judgment of the courts of another state."

Morris v. Jones, U. S. S. C. Adv. Op., Vol. 91, No. 6, Page 399 (Syl. 1).

4. Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

I.

At the outset your petitioner desires to direct the attention of this Honorable Court to the fact that the questions presented herein are of nationwide importance and are very similar in certain aspects to one or more of the questions presented in *Martin V. B. Coe v. Katherine C. Coe,* S. C. U. S., October Term, 1946, No. 958 (Certiorari granted March 3, 1947, U. S. S. C. Adv. Op., Vol. 91, No. 9, Page 689), and to the fact that in very similar matters presenting not identical but closely related points, certiorari was granted by this Honorable Court on November 24, 1947, in the matter entitled *Louis Kreiger v. Helene Kreiger,* No. 371, October Term, 1947, and that subsequently certiorari has been granted in *Joseph Estin v. Gertrude Estin,* No. 139, October Term, 1947, upon rehearing following a denial of certiorari on October 13, 1947.

This case presents a question of fundamental importance under the Full Faith and Credit Clause in refer-

ence to the judgment of one state predicated upon a contract between husband and wife concerning "payments for the support of the wife" and the construction and interpretation of said judgment by the courts of a sister state, which construction and interpretation were based upon its laws and not upon the laws of the state rendering the judgment.

There is no question here as to the validity of the Utah judgment as both petitioner and respondent have at all times proclaimed its validity. The Court had personal jurisdiction over both parties and therefore had the power to enter a valid personal judgment. *Pennoyer v. Neff*, 95 U. S. 714.

The action of the California courts here, if allowed to stand, would establish a precedent whereby all courts in all states could circumvent the operation of the Full Faith and Credit Clause by simply stating that "We do not refuse to consider the judgment of the sister state but we do propose to declare that what has been adjudicated elsewhere is what we declare was there adjudicated, and that our laws will be applied in determining same." The extreme danger of any such precedent is apparent here for your petitioner is protected under the Constitution and laws of the State of Utah and particularly by the provisions of Section 1212, Comp. Laws, 1907, of that state, if all states are required to give full faith and credit to the judgment rendered by Utah in his favor, in this, that from time to time as circumstances or conditions warrant it he may appear before the courts of that state and seek

a modification as provided by its laws of the support provisions embodied in the divorce decree, whereas this right has been completely and effectively and finally, except for the intervention of this Honorable Court, denied him by the courts of California, in construing said decree in accordance with its laws, so as to make the alimony payments provided for therein and declared to be "for the support of the wife" not payments for the support of the wife at all but, on the contrary, "an award to her of a life annuity as long as she did not remarry, given to the wife as part of a property settlement contract. (*Parker v. Parker,* 193 Cal. 478, 480, 481, 225 P. 447.)" [R. 91-92.]

II.

This Honorable Court has been called upon, heretofore, to consider a similar failure of the courts of California to grant full faith and credit to the decree of a sister state in a separate maintenance action and, finding the question substantial, this Honorable Court assumed jurisdiction and after disposing of the main contention of the Supreme Court of California by the following statement:

> "But conceding without deciding that the California law is as asserted the proposition of fact upon which the argument rests *amounts simply to denying all effect to the Illinois decree*";

then declared:

> "From these conclusions it necessarily follows that the issue presented in this action for divorce was

identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the Supreme Court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled and thereby violated the Constitution of the United States." (Emphasis added.)

Harding v. Harding, 198 U. S. 317, 340, 341, 49 L. Ed. 1076.

III.

Found substantial also by this Honorable Court was the questions presented in *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, where the appellant successfully contended that the failure of the courts of Nebraska to observe that "the findings and decree" of the courts of Arkansas in reference to alimony constituted a denial to him of rights guaranteed under the Constitution of the United States. This Honorable Court, in sustaining his contentions, said:

"Our rule is that an estoppel by judgment is 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. Sac County,* 94 U. S. 352, 24 L. Ed. 197."

Bates v. Bodie, 245 U. S. 520, 525, 62 L. Ed. 444, 449.

IV.

The failure to apply said "rule" was recently found to present a substantial question in *Heiser v. Woodruff,* 326 U. S. 726, where this Honorable Court said:

"In general a judgment is *res adjudicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but are not raised and litigated in the suit."

Heiser v. Woodruff, 326 U. S. 726, 735, 90 L. Ed. 970, 977.

V.

Noted as substantial also were the similar questions presented in *Davis v. Davis*, 305 U. S. 32, 83 L. Ed. 26, where this Honorable Court declared that each state is required to give not some but full faith and credit to judicial proceedings of other states.

VI.

The questions presented must be regarded, too, as being substantial when viewed in the light of the rule stated by this Honorable Court in *Williams v. North Carolina*, 325 U. S. 226, 228, 89 L. Ed. 1577, 1581:

"In short the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill defined concept of comity."

The failure of the courts of California to observe that it was declared in that case that the correct procedure under the Constitution, for the collection or enforcement of a judgment recovered in another state, was to first sue on it and recover a judgment on it; not only presents a substantial question but invites the supervision of this Honorable Court here.

VII.

A like question most certainly is presented when we note that, notwithstanding the fact that the Supreme Court of Utah has declared that ". . . the court may make such order respecting the property and the maintenance of the wife and children, as is just and equitable, *and such order and decree may be made to continue in force after his decease* . . ." (Emphasis added.) *Murphy v. Moyle,* 17 Utah 113, 120, 53 Pac. 1010; which rule said court expressly upheld in *Beesley v. Badger, et al,.* 66 Utah 194, 199; that the courts of California in construing the final judgment of the Utah Court herein expressly declared that "The legal obligation imposed by law to support the wife by payment of permanent alimony come to an end upon the death of either party." [R. 91], and that therefore the judgment of the Utah Court providing for "payments for the support of the wife" [R. 91] ' "were not in the nature of alimony but were by way of property settlement' " [R. 91] and "It was an award to her of a life annuity so long as she did not remarry . . ." [R. 91.]

VIII.

If this Honorable Court is unable to say that every question presented has been foreclosed by prior decisions and are clearly not debatable, it cannot be said that no question of substance is presented.

Chesebro v. Los Angeles County Flood Control District, 306 U. S. 459, 463;

Hamilton v. University of California, 293 U. S. 245, 258.

5. Stage in Proceedings and Method of Raising Federal Question.

When the action was called for trial in the Superior Court your petitioner, the defendant therein, moved to dismiss because of the lack of jurisdiction [R. 75-76] by reason of the fact that the agreement sued upon had become merged in the Utah judgment. [R. 76.]

The respondent opposed such motion and argued that notwithstanding the admitted fact that the agreement sued upon had been attached to plaintiff's complaint in the Utah action, and expressly made a part thereof; and the fact that by the prayer thereto plaintiff sought a decree of divorce and judgment that the said agreement be confirmed, and for "equitable relief" [R. 48]; and notwithstanding that the Utah court, in its Findings of Fact expressly made said agrement ". . . a part of these findings of fact" [R. 59]; and included in its "Conclusions of Law" a recital that said agreement "be and is hereby confirmed and approved" [R. 60]; and embodied in its decree a declaration that said agreement ". . . is hereby confirmed and approved" [R. 61]; that said agreement had not merged in said judgment.

The motion of your petitioner was denied upon the ground that the Utah decree was not enforceable by contempt proceedings [R. 77] and the Superior Court proceeded to enter a money judgment under the agreement in favor of respondent and against your petitioner [R. 78; 37-38]; notwithstanding that as declared by the Su-

preme Court of Utah in *Beesley v. Badger,* 66 Utah 194, respondent's claim for unpaid weekly support payments was, under said decree, ". . . upon the same footing as an ordinary money judgment(s) and may be enforced in the same manner that ordinary money judgment(s) may be enforced." (Page 199.)

Your petitioner appealed from the said judgment and in both his opening and closing briefs upon appeal and in his petition to the Supreme Court of the State of California following decision by the District Court of Appeal, urged said points and protested that rights guaranteed to him under the Constitutions and Laws of both Utah and California and under the Constitution of the United States had been denied him.

Your petitioner, upon oral argument before the District Court of Appeal, argued at length that his rights guaranteed to him by said State Constitutions and by the Constitution of the United States had been denied to him; and said Court, in response to your petitioner's request then made, did, in its decision, expressly pass upon the question of the violation of your petitioner's rights under the Constitution of the United States, which Court, however, there held, without the citation of authority, that "Appellant's contentions . . . cannot be sustained." [R. 91.] The Supreme Court, after considering the same matters by a divided court then refused to grant your petitioner a hearing.

C.

THE QUESTIONS PRESENTED.

1. It being conceded that there is no question here of the validity of the divorce decree of the Utah court; may the court of California refuse to give full faith and credit, as required by the provisions of Article IV, Section 1, of the Constitution of the United States to that decree, because, in the opinion of the courts of California, said decree could not be enforced in California "by contempt proceedings" [R. 87]?

2. May the courts of California construe the divorce decree of the Utah court, providing for weekly payment "for the support of the wife" as not being "in the nature of alimony" [R. 91] but as being "an award to her of a life annuity. . . ." [R. 91] "given to her as part of a property settlement contract" [R. 92]; which construction is predicated upon the declaration, as long held by the courts of California, that "The legal obligation imposed by law to support the wife by payment of permanent alimony comes to an end upon the death of either party" [R. 91]; which contention is expressly contrary to the laws of not only Utah but also of such states as Massachusetts, West Virginia, Washington, Oregon, Arizona and Minnesota; without violating the provisions of the Full Faith and Credit Clause of the Constitution of the United States?

3. May the courts of California hold, without violating said Clause, that the "Property Settlement and Separa-

tion Agreement" presented to the Utah court and by it expressly made a part of its Findings of Fact and expressly confirmed and approved by it in its decree "was not incorporated in nor made an operative part" of said decree [R. 89] and did not merge therein, because said decree was in California "wholly insufficient to support contempt proceedings" [R. 89], and, in California, "legally insufficient to warrant the docketing of a money judgment against plaintiff" [R. 89]; particularly when considered in the light of the fact that the Supreme Court of Utah, relying on *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, and other decisions cited, has held in *Smith v. Smith,* 77 Utah 60, 66 ". . . that the final judgment in an action granting a divorce settles all property rights of the parties, *and is a bar to action afterwards by either of the parties to determine the question of alimony or any property rights which might have been settled by such judgment"* (emphasis added); and has held in *Beesley v. Badger, et al.,* 66 Utah 194, 199, that past due and unpaid installments of alimony described in a decree for alimony ". . . stand(s) upon the same footing as ordinary money judgments and *may be enforced by execution in the same manner that ordinary judgments may be enforced"?* (Emphasis added.)

4. Did the District Court of Appeal of the State of California err in expressly holding that the denial to your petitioner of the right existing in him, under the Constitution and Laws of the State of Utah, and particularly under the provisions of Section 1212, Comp. Laws, 1907, of that state; to appear before the courts of that state, as circumstances required it, and seek modification of the support payments embodied in the divorce decree; did not

deny him rights guaranteed to him by the provisions of subdivision 1 of the Fourteenth Amendment to the Constitution of the United States and by the provisions of Section 13, Article I, of the Constitution of the State of California.

5. May, under the Full Faith and Credit Clause, the question of payments for the support of the wife be relitigated in California following the presentation of that question by both husband and wife to the Utah Court in a divorce action between them in which a final judgment was entered, that as shown by the Findings of Fact, the Conclusions of Law and the Decree, expressly considered and determined that question?

D.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

I.

The District Court of Appeal of the State of California has decided a Federal question of substance which is of nationwide importance in this, that it concerns the effect of agreements between husband and wife in reference to their property and of a division thereof and of separation agreements containing provisions "for the support of the wife," when such agreements are presented by the parties thereto to a court of competent jurisdiction; which court proceeds to determine rights thereunder and then causes the result thereof to be embodied in a decree of divorce, which decree, after becoming final, is duly presented in the courts of a sister state as a bar, under the Constitution of the United States, to an attempted relitigation of matters expressly determined, in the decree of the other state.

II.

This Honorable Court has granted certiorari in the matter entitled *Martin V. B. Coe v. Katherine C. Coe,* No. 958, October Term 1946, where one of the questions presented is clearly quite similar to one of the questions here. Petitioner there states under the heading "Reasons for Granting the Writ," in part as follows:

> "3. This case presents a question of importance under the Full Faith and Credit Clause with respect to the property incidents of marriage which has not yet been decided by this Court. The Nevada judgment at the instance of respondent dealt with questions of support and the property rights of the parties. The decree of the Court approved and adopted a contract entered into by the parties and therefore had the power to enter a valid personal judgment. *Pennoyer v. Neff,* 95 U. S. 714. . . . Thus, in the instant case, the Nevada judgment, made with both parties before the Court, finally determining questions of support and property, is held void, thereby depriving petitioner of the benefits of the Nevada judgment, which finally disposed of such issues. *Cf. Yarborough v. Yarborough,* 290 U. S. 202." (Petition for a Writ of Certiorari, pp. 12 and 13.)

Petitioner in the *Coe* case also points out that

> "In the second Williams case, ***supra,*** at pages 233-234, this Court stated: 'The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But the respondent in this case has been made to bear no such burden. On the contrary it has been the petitioner who has been made to bear the burden of the Nevada decree, the

effect of which has been ignored by the Court, apparently upon the theory that, since it is a Nevada divorce, it is *ipso facto* invalid.' " (Pet. pp. 9 and 10.)

As there, so here, the California Court has ignored the effect of the Utah decree apparently upon the theory that it is insufficient to sustain "contempt proceedings" in California and is insufficient to justify the "docketing of a money judgment in California."

Not only has the effect been ignored by the California Court, but the decree of the Utah Court has in effect been declared void, upon the theory that "payments for the support of the wife" cannot be such but are an "award of a life annuity," which theory is predicated upon the contention that in California alimony payments cease upon the death of either husband or wife. The fact that the Supreme Court of Utah has held in *Murphy v. Moyle,* 17 Utah 113, 120, 53 Pac. 1010, that ". . . the Court may make such order respecting the property *and the support and maintenance of the wife* and children, as is just and equitable, *and such order or decree may be made to continue in force after his decease*" (Emphasis added) (approved in *Beesley v. Badger,* 66 Utah 194, 199), has been ignored by the California Court in construing the decree of the Utah Court. See *Prime v. Prime,* 172 Ore. 34, 49, 50, 13 P. (2d) 550, where upon the consideration of a Property Settlement and Separation Agreement which had been "approved as fair in the divorce decree" by the trial court the Supreme Court, after holding that even though the support provisions were included in the same instrument with the property settlement provisions; that they "are to be deemed separable" and to "be viewed in the nature of alimony," then proceeds to describe a "conflict of authority" as to "whether the court has the

power to extend such payments beyond the lifetime of the defendant." The Court, after setting forth a list of cases from Utah, Massachusetts, West Virginia, Washington and Minnesota, which it states "support the view that a decree unsupported by contract may validly impose an obligation to pay alimony which will bind defendant's estate"; sets forth a list of cases from California and New York and a reference to C. J. S. ("citing authorities on both sides") in support of the contention "that the court cannot by divorce decree extend the obligation of support in the nature of alimony so as to bind the husband's estate."

III.

This Honorable Court has also granted certiorari on November 24, 1947, in *Louis Kreiger v. Helene Kreiger*, No. 371, October Term 1947, and shortly thereafter, upon rehearing, granted certiorari in *Joseph Estin v. Gertrude Estin*, No. 139, October Term 1947. The questions presented in both of these cases are not identical but are closely related matters to certain of those presented here.

Petitioner states, in the *Krieger* case, under the heading "Reasons for Granting the Writ":

> "2. The decisions in New York made prior to the decision in *Williams v. North Carolina*, 317 U. S. 287, held that a valid divorce decree ended the right of a woman to collect alimony from her former husband under a pre-existing separation decree and are of the same type as respect the manner in which the divorce was obtained, as are the Pennsylvania cases cited by the majority opinion of this Court in *Esenwein v. Commonwealth of Pennsylvania* (*supra*), as fixing the law of that Commonwealth." (Petition for Certiorari, pp. 6, 7.)

The difference here is that the California Court has entered judgment for alimony under a contract providing for such, existing prior to the decree of divorce, granted the husband in the State of Utah, which decree expressly determined the rights of the wife as to alimony.

IV.

The decision asked to be reviewed here is contrary to the decisions of this Honorable Court in the following cases:

Bates v. Bodie, 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444;

Morris v. Jones, U. S. Sup. Ct. Adv. Op., Vol. 91, No. 6, pp. 399, 401;

Williams v. North Carolina, 317 U. S. 287, 302, 87 L. Ed. 278, 288;

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 439, 88 L. Ed. 149, 155;

Riley v. New York Trust Co., 315 U. S. 343, 348, 86 L. Ed. 885, 891;

Davis v. Davis, 305 U. S. 32, 88 L. Ed. 26;

Sovereign Camp W. O. W. v. Bolin, 305 U. S. 66, 83 L. Ed. 45;

Barber v. Barber, 323 U. S. 77, 89 L. Ed. 82;

Hamer v. New York Railways Co., 244 U. S. 266, 61 L. Ed. 1125;

Heiser v. Woodruff, 326 U. S. 726, 735, 90 L. Ed. 970, 977;

Williams v. North Carolina, 325 U. S. 226, 229, 89 L. Ed. 1577, 1581;

Harding v. Harding, 198 U. S. 317, 388, 49 L. Ed. 1066, 1075;

Barber v. Barber, 21 Howard (62 U. S.) 582.

This Honorable Court has recently said in *Barber v. Barber,* 323 U. S. 77, 89 L. Ed. 82:

> "The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right, and the sufficiency of the grounds of denial is for this Court to decide. *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 443; 88 L. Ed. 149, 157; 64 S. Ct. 208; 150 A. L. R. 413 and cases cited."

Here, California has refused to give credit to the Utah decree not only because of its nature but upon the ground that contempt proceedings cannot be sustained thereunder in California, and because the decree provides for continuing alimony payments following the death of the husband, which payments, while clearly allowable in Utah, are, as viewed by the California Court, non-allowable in California.

This Honorable Court has also said, when speaking of the Full Faith and Credit Clause, that it is not only effective in requiring that a judgment of one state "Controls in other states to the same extent that it does in the state where rendered" but what is of even greater importance here:

> "This is true even though the cause of action merged in the judgment could not be enforced in the state where the enforcement of the judgment is sought."
>
> *Riley v. New York Trust Co.,* 315 U. S. 343, 348, 349, 86 L. Ed. 885, 891.

V.

A final judgment of a court having jurisdiction of the parties and of the subject matter operated as *res adjudicata. Morris v. Jones,* U. S. Sup. Ct. Adv. Op., Vol. 91, No. 6, pp. 339, 402.

As stated by Mr. Justice Brandeis, when speaking for this Honorable Court in *Hamer v. New York Railways Co.,* 244 U. S. 266, 61 L. Ed. 1125:

> "If there is any one principle of law settled beyond all question it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatum,* and the judgment thereupon remains in full force unreversed the original cause of action is merged and gone forever."

Generally, too, a judgment is *res adjudicata* as to all matters which could have been litigated therein. *Heiser v. Woodruff,* 326 U. S. 726, 735, 90 L. Ed. 970, 977; *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430; *Cromwell v. County of Sac,* 94 U. S. 351.

Relying upon *Bates v. Bodie,* 245 U. S. 520, and other cases cited, the Supreme Court of Utah has applied this rule in *Smith v. Smith,* 70 Utah 60, 66, in determining whether a decree of divorce constituted a bar to a subsequent attempt to collect alimony. We quote from page 66 as follows:

> "In *Roe v. Roe,* 52 Kansas 724, 35 Pac. 808, 39 Am. St. Rep. 367, it is said that the final judgment in an action granting a divorce settles all property rights of the parties, and is a bar to action afterwards brought by either of the parties to determine the question of alimony or any property rights which might have been settled by such judgment. To the

same effect are the following: *Muckenberg v. Holler,* 29 Ind. 139, 92 Am. Dec. 345; *Behrley v. Behrley,* 93 Ind. 255; *Hardin v. Hardin,* 38 Texas 617; *Taylor v. Taylor,* 54 Or. 560, 103 Pac. 525; *Bates v. Bodie,* 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 355; *Allen v. Allen,* 159 Cal. 197, 113 Pac. 160; *Barnett v. Barnett,* 9 N. B. M. 205, 50 P. 337."

Smith v. Smith, 77 Utah 60, 66.

VI.

The California Court has failed to note that it has been said that courts cannot alter, amend or repeal judicial proceedings of another state without violating the Full Faith and Credit Clause of the Federal Constitution. *Dry v. Rice,* 147 Va. 331, 137 S. E. 473.

It has also been held that courts should not determine what part of a judgment of a court of another state will be effective and what part not; if such a judgment is regular on the face of the record it must be given full effect in all its terms. *Caruthers v. Corbin,* 38 Ga. 75. This rule has been expressly violated by the Court below as has been heretofore shown.

This Honorable Court has held that upon the determination of a controversy in accordance with the laws of another state, it is required that full faith and credit be given to the judgment of that state construing its own laws. *Sovereign Camp W. O. W. v. Bolin,* 305 U. S. 66, 83 L. Ed. 45. Utah has expressly recognized that rule in *Lawson v. Woodmen of the World,* 88 Utah 267, 53 P. (2d) 432. The California Court has, however, failed to recognize that rule here but has, on the contrary, construed the judgment of the Utah Court in accordance with

California law and expressly contrary to the laws of Utah as existing and as declared by its Supreme Court.

The construction and interpretation of a judgment are governed by the law of the state where it was rendered.

In re National Surety Co., 284 N. Y. 593, certiorari denied, *Laughlin v. Pink*, 311 U. S. 707, 85 L. Ed. 459;

Shreve Furniture Co. v. Manufacturers Assn., 168 Ark. 756, 271 S. W. 954;

Union Fire Ins. Co. v. Hansen, 237 Mo. App. 1110, 180 S. W. (2d) 265;

Swift & Co. v. Boston & M. R. R., 82 N. H. 170, 131 Atl. 441.

VII.

The doctrine of *res adjudicata* is not a technical defense. It is a rule of fundamental and substantial justice, of public policy and peace and must be enforced by the courts.

Hart Steel Co. v. Railway Supply Co., 224 U. S. 294, 61 L. Ed. 1148;

Sun Indem. Co. v. United States (C. C. A. 3d), 91 F. (2d) 120;

United States v. United States Fidelity and Guaranty Co. (C. C. A. 10th), 106 F. (2d) 804.

Conclusion.

Your petitioner presents here highly important problems in reference to property rights and the right of maintenance arising out of the marriage relation as well as important questions affecting all States in reference to what sort of full faith and credit shall, under the Con-

stitution of the United States, be given decrees of sister States dealing with such matters, and presents an important question of denial of rights under the Fourteenth Amendment to that Constitution. See article entitled "The Divorce Snafu" appearing in Collier's, December 13, 1947, which speaks of ". . . enormous confusion and hardship afflicting large numbers of Americans all the time" which, as seen by the publication's editors, arise "because we have 48 different state divorce laws." To the question there asked: "Can anything be done about it?" your petitioner respectfully suggests that there is an obvious answer and that is that each State in all cases, where fraud and collusion are not present, obey the Constitution by giving full faith and credit to the divorce decrees of other states, and that in those cases where there is a failure to do so; that this Honorable Court, upon behalf of the People of the United States, exercise its superior jurisdiction and require obedience, by each state, of the will of the People as expressed in their Constitution.

Petitioner prays that this petition for a writ of certiorari be granted, and that the judgment below be reversed.

Respectfully submitted,

HIRAM T. KELLOGG,
Attorney for Petitioner.

LAWRENCE M. CAHILL,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner respectfully presents this brief in support of his petition for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review the judgment of that Court rendered in the case entitled *"Fred J. Howarth v. Mae K. Howarth."*

Opinions of the Court Below.

The opinion of said District Court of Appeal is reported in 81 Advance California Appellate Reports at page 324.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. Sec. 344 (b).) The decision of the said District Court of Appeal sought to be reviewed, was rendered on the

18th day of August, 1947. [R. 82.] Within the time allowed by the "Rules on Appeal," adopted by the Judicial Council of the State of California on March 30, 1943, your petitioner filed a petition for a hearing in the Supreme Court of the State of California, which petition was considered by that Court, and by a divided Court (2 of the Justices voting for a hearing) was denied on the 16th day of October 1947. [R. 96.] The judgment then became final. A petition for a writ of certiorari presented to this Honorable Court within three months thereafter is in time.

American Ry. Express Co. v. Levee, 263 U. S. 19, 21; 68 L. Ed. 140.

Statement of the Case.

A complete statement of the case has been made in the petition under the headings: "Summary Statement of the Matter Involved" p. 2; "Petitioners Contentions" p. 7; "Respondents Contentions" p. 8. Therefore in the interest of brevity and because of the fact that the petition and this brief are to be bound under a single cover, the facts of the case will not be repeated here, other than to say that the facts presented disclose a failure and refusal by the State of California, to give full faith and credit to a final decree of divorce duly rendered and existing in the State of Utah, determining, not only that a divorce be granted to your petitioner, but also determining property rights, custody of a minor child, and payments for the support of the wife, which denial was based upon the grounds that because the decree was "insufficient to support contempt proceedings" in California [R. 89]; and was "legally insufficient to warrant the docketing of a money judgment" [R. 89] in California;

and because under California law "The legal obligation imposed by law to support the wife by payment of permanent alimony comes to an end upon the death of either party" [R. 91], that the "Property Settlement and Separation Agreement" [R. 50, 55], containing provisions for "weekly payments . . . for the support of the wife" [R. 53]; did not become "incorporated in nor made an operative part" [R. 89] thereof, notwithstanding the fact that the totally uncontradicted evidence disclosed the following:

(a) That the document entitled "Property Settlement and Separation Agreement," which contained provisions "for the support of the wife" and for the custody, education and support of the children of the parties was in its entirety attached to plaintiff's complaint in the Utah divorce action and by reference expressly made a part thereof;

(b) That the Utah Court made a finding that said agreement was "*By reference made a part of* these findings of fact.", and a further finding that "*Such agreement is just and proper in its terms.*"

(c) That the Utah Court included in its conclusions of law a recital that said agreement "*Be and is hereby confirmed and approved*";

(d) That the Utah Court incorporated in its decree an express declaration "*That the property settlement and agreement . . . is hereby confirmed and approved.*" (Emphasis added.)

These conclusions were reached by the California Court in construing the Utah decree in accordance with the laws and decisions of California, and in disregard of the fact that the Supreme Court of Utah has held in *Murphy v.*

Moyle, 17 Utah 113, 120, 53 Pac. 1010, that ". . . the court may make such order respecting the property *and the support and maintenance of the wife and children,* as is just and equitable, *and such order or decree may be made to continue in force after his decease*" (emphasis added), which holding was expressly upheld by that court in *Beesley v. Badger,* 62 Utah, 194, 199.

It was necessary also for the California Court, in reaching such conclusions to ignore the declaration of the policy of the People of Utah, in reference to such matters, which as stated by its Supreme Court in *Smith v. Smith,* 77 Utah 60, 66 as follows:

> ". . . the final judgment in an action granting divorce settles all property rights of the parties and is a bar to action afterwards brought by either of the parties to determine the question of alimony or any property rights which might have been settled by such judgment."

The facts presented also disclose a denial by the California Court of the right existing in him under the Constitution and laws of Utah and particularly under the provisions of Section 1212, Comp. Laws 1907, to appear before the Courts of Utah and ask that they modify the support provisions in the divorce decree granted to him, which right has bee nexpressly declared to exist, by the Supreme Court of that State, in *Bazzo v. Bazzo,* 425 Utah 625; and it has been held in *Barraclough v. Barraclough,* 100 Utah 196, that the Courts do not lose the power to modify their decrees if the Court adopts the

suggestions of the parties to a divorce action regarding alimony.

Your petitioner contends that either the denial of such rights or of the rendering them ineffective by the California Court constitute not only a violation of the provisions of Article IV, Section I of the Constitution of the United States, but also a denial of rights guaranteed by the provisions of subdivision I of the Fourteenth Amendment to the Constitution of the United States.

Specifications of Error.

The Court below erred:

1. In failing to give full faith and credit to the Utah decree;
2. In holding that the Utah decree was not a bar to the recovery by respondent of a money judgment under the terms of the "Property Settlement and Separation Agreement" [R. 87];
3. In holding that the "Property Settlement and Separation Agreement" had not been made an operative part of the divorce decree, by the Utah Court [R. 86];
4. In holding that the "Property Settlement and Separation Agreement had not merged in said decree [R. 86, 87];
5. In holding that your petitioner's contention that he may not be deprived of the right to have the support provisions of the decree of the Utah Court modified as provided by the Constitution and Laws

of the State of Utah, without denying to him rights guaranteed to him under the Constitution of the United States, as well as under the Constitution of the State of California; "cannot be sustained" [R. 90];

6. In being in any manner concerned with the availability of contempt of Court proceedings in California, as a means of enforcing the Utah decree [R. 89];

7. In holding that "The legal obligation imposed by law to support the wife by the payment of permanent alimony comes to an end upon the death of either party [R. 91];

8. In holding that the words "The weekly payments provided by paragraph 12 are for the support of the wife" [R. 96], are not payments for the support of the wife [R. 91]; but ". . . was an award of a life annuity so long as she did not remarry given to her as part of a property settlement contract" [R. 91, 92];

9. In failing to find that the Utah decree was *res judicata* and entitled to full faith and credit as to all of the following:

   a. The termination of the marriage relation;

   b. The division of the property;

   c. The custody of the minor child;

   d. Payments for the support of the wife.

10. In affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles.

Summary of the Argument.

POINT ONE.

THE CALIFORNIA COURT HAS FAILED TO GIVE TO THE DECREE OF THE UTAH COURT THE DUE FAITH AND CREDIT TO WHICH IT IS ENTITLED AND HAS THEREBY VIOLATED THE CONSTITUTION OF THE UNITED STATES.

POINT TWO.

THE FULL FAITH AND CREDIT CLAUSE REQUIRES THE JUDGMENTS OF THE COURTS OF ONE STATE BE GIVEN THE SAME FULL FAITH AND CREDIT IN SISTER STATES AS THEY HAVE BY LAW OR USAGE IN THE STATE GRANTING THE JUDGMENT.

POINT THREE.

CLAIMS UNDER THE "PROPERTY SETTLEMENT AND SEPARATION AGREEMENT" MAY NOT BE RE-LITIGATED IN CALIFORNIA WITHOUT VIOLATING THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

POINT FOUR.

CALIFORNIA MAY NOT DENY FULL FAITH AND CREDIT TO THE UTAH DECREE ON THE THEORY THAT IT MAY NOT BE SUFFICIENT TO SUSTAIN CONTEMPT OF COURT PROCEEDINGS IN CALIFORNIA.

POINT FIVE.

THE "PROPERTY SETTLEMENT AND SEPARATION AGREEMENT" MERGED IN THE UTAH DECREE AND ALL CLAIMS OR RIGHTS THEREUNDER ARE NOW SO MERGED IN EVERY OTHER STATE.

POINT SIX.

UNDER THE LAWS OF UTAH THE SUMS DESCRIBED IN THE CALIFORNIA JUDGMENT ARE A MONEY JUDGMENT ENFORCEABLE THERE BY EXECUTION.

POINT SEVEN.

THE PROVISIONS OF PROPERTY SETTLEMENT AND SEPARATION AGREEMENT FOR WEEKLY INSTALLMENTS PAYABLE TO AND "FOR THE SUPPORT OF THE WIFE" WAS A SEVERABLE ONE IN THE NATURE OF ALIMONY.

POINT EIGHT.

THE COMMON LAW RULE, THAT THE OBLIGATION TO PAY ALIMONY TERMINATES UPON THE DEATH OF EITHER HUSBAND OR WIFE, IS NOT THE LAW OF UTAH AND THE CALIFORNIA COURT HAS CONSTRUED THE UTAH DECREE UNDER THE COMMON LAW RULE.

POINT NINE.

THE UTAH DECREE IS RES JUDICATA, NOT ONLY AS TO ALL MATTERS LITIGATED THEREIN BUT AS TO ALL MATTERS THAT COULD HAVE BEEN LITIGATED THEREIN.

ARGUMENT.

POINT ONE.

The California Court Has Failed to Give to the Decree of the Utah Court the Due Faith and Credit to Which It Was Entitled and Has Thereby Violated the Constitution of the United States.

This Honorable Court has long ago declared such violation under very similar circumstances. In determining whether the separate maintenance decree entered in Illinois upon the stipulation of the parties, was conclusive in the Courts of California in a subsequent divorce action this Honorable Court said:

> "But conceding without deciding that the California law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree."
>
> *Harding v. Harding,* 198 U. S. 317, 338, 49 L. Ed. 1066, 1075.

Elsewhere in its decision we note the following:

> "This being the case it follows that the Supreme Court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois Court the due faith and credit to which it was entitled and thereby violated the Constitution of the United States."
>
> *Harding v. Harding,* 198 U. S. 317, 340, 341.

This point is also fully sustained by the following cases:

Morris v. Jones, 91 U. S. Sup. Ct. Adv., Op. Vol. 91, No. 6, p. 399;

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 88 L. Ed. 149;

Riley v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885;

Williams v. North Carolina, 325 U. S. 226, 89 L. Ed. 1577;

Barber v. Barber, 323 U. S. 77, 89 L. Ed. 82.

The Honorable Court has also declared the rule to be, that each state is required to give not some but full faith and credit to judicial proceedings.

Davis v. Davis, 305 U. S. 32, 83 L. Ed. 26.

And, as stated in *Milwaukee County v. White Co.,* 296 U. S. 268, 277, 80 L. Ed. 220, 228:

> "The very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the law or by the judicial proceedings of the others, and to make them integral parts of a single nation, through which a remedy upon a just obligation might be demanded as of right irrespective of its origin. That purpose ought not lightly to be set aside in deference to a local policy, which, if it exists, would seem to be too trivial when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged."

POINT TWO.

The Full Faith and Credit Clause Requires the Judgments of the Courts of One State to Be Given the Same Full Faith and Credit as They Have by Law or Usage in the State Granting the Judgment.

It has been expressly so held in the following cases:

Morris v. Jones, U. S. Sup. Ct., Adv. Op., Vol. 91, No. 6, p. 399, 401, 403;

Riley v. New York Trust Co., 315 U. S. 343, 348, 349, 86 L. Ed. 885, 890.

POINT THREE.

Claims Under the "Property Settlement and Separation Agreement" May Not be Re-Litigated in California, Without Violating the Provisions of the Constitution of the United States.

This Honorable Court has said:

"The full faith and credit to which a judgment is entitled is the credit which it has in the state from which it was taken, not the Credit that under other circumstances it might have had."

Morris v. Jones, U. S. Sup. Ct., Adv. Op. Vol. 91, No. 6, pp. 399, 403.

At page 403 the Court, speaking of a final judgment said:

"That determination is final and conclusive in all courts."

"For the Full Faith and Credit Clause established 'throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be conclusive of the rights of the

parties in every other court as in that where the judgment was rendered.' *Id.* p. 439. And see Riley v. New York Trust Co., 315 U. S. 343, 348, 349, 86 L. ed. 885, 890, 891, 62 S. Ct., 608. *The nature* and amount of *petitioners claim may not thereafter, be challenged or retried* in the Illinois proceedings." (Emphasis added.)

Morris v. Jones, U. S. Sup. Ct., Adv. Op. Vol. 91, No. 6, pp. 399, 403.

A further reason for the rule was given in *Riley v. New York Trust Co.,* 315 U. S. 343, 348, 349, 86 L. Ed. 885, 891, from which case we now quote as follows:

"Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could again wage their legal battles whenever they met in other jurisdictions."

POINT FOUR.

California May Not Deny Full Faith and Credit to the Utah Decree on the Theory That It May Not Be Sufficient to Sustain Contempt of Court Proceedings in California.

Diligent research has failed to reveal a case where, as here, one of the reasons assigned for the refusal to give full faith and credit to the judgment of a sister state has been that it appeared to be insufficient to sustain contempt of court proceedings, but did reveal a case where the trial court refused to grant such faith and credit because the right did not exist to directly issue writs of execution upon the judgment. The Supreme Court of Maine in brushing the objection aside as being without foundation said:

"It was also claimed, as in this case, that the act cannot have the effect contended for, *because it does*

not enable the courts of this state to issue executions directly on the original judgment, and the court says: 'This objection, if it were valid, would apply to every other court of the same state where the judgment was rendered. *But it has no foundation.* The right of a court to issue executions depends upon its own powers and organization. *Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.'* See Mc Elmoyle v. Cohen, 13 Peters 312; Bissell v. Briggs, 9 Mass. 462. Hampton v. McConnell, 3 Wheat. 234." (Emphasis added.)

Damon v. Webber, 111 Maine 473, 477, 478, 89 Atl. 734.

This Honorable Court has stated the rule effective, even in those cases where the cause of action, merged in the judgment, could not be enforced in the State where the judgment is taken. We quote from *Riley v. New York Trust Co.,* 315 U. S. 343, as follows:

"That clause compels that controversies be stilled so that where a state court has jurisdiction of parties and subject matter, its judgment controls in other states to the same extent that it does in the state where rendered. Roche v. McDonald, 275 U. S. 449, 451, 72 L. ed. 365, 368, 48 S. Ct. 142, 53 A. L. R. 1141. This is true even though the cause of action merged in the judgment could not be enforced in the state where the enforcement of the judgment is sought. (Christmas v. Russell, 5 Wall. (U. S.) 290, 302, 18 L. ed. 475, 478; Fauntleroy v. Lum, 210 U. S. 230, 236, 52 L. ed. 1039, 1041, 28 S. Ct. 641."

Riley v. New York Trust Co., 315 U. S. 343, 348, 349; 86 L. Ed. 885, 891.

POINT V.

"The Property Settlement and Separation Agreement" Merged in the Utah Decree and All Claims or Rights Thereunder Are Now Merged in Every Other State.

We have hereinbefore referred several times to the decision of this Honorable Court in *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, where it was held that the divorce decree, which provided for alimony as set forth in a consent agreement of the parties, and "the findings" of the Arkansas Court were entitled to full faith and credit in the Courts of Nebraska and constituted a full and complete bar to plaintiff's right to recover additional alimony under the laws of the State of Nebraska.

Mr. Justice McKenna, speaking for the Court, said at page 525:

> "The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, *and the principle would seem to have special application to a judgment for divorce and alimony. They are usually con-comitants in the same suit—some cases say must be*—or rather, that as alimony is an incident of divorce, *it must be awarded by the same decree that grants the separation. And it is the purpose to unite them, as alimony necessarily depends upon* a variety of circumstances *more adequately determined in the suit for divorce,* not only the right to it, *but the measure of it*—all circumstances upon which it depends then naturally brought under the view and judgment of the Court. Whether, however, the right to it should be litigated in the suit for divorce or may be

sought subsequently in another the principle is applicable *that what is once* adjudged cannot be tried again." (Emphasis added.)

Bates v. Bodie, 245 U. S. 520, 525, 621 L. Ed. 444, 449.

Elsewhere in said decision we find the rule stated, which, if applied here, necessarily leads to the identical final conclusion there stated: "We think, therefore, that due faith and credit required by the Constitution of the United States was not given to the decree." (P. 531.)

The rule referred to was declared as follows:

"But how find the matters in issue of the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other. *National Foundry and Pipe Works v. Oconto Supply Co.,* 183 U. S. 216, 234, 46 L. Ed. 157, 169, 22 Sup. Ct. Rep. 111. If there be generality and uncertainty, to what extent there may be specification and limitation by evidence *aliunde* there is some conflict in the cases. But we are not called upon to review or reconcile them. *Our rule is that an estoppel by judgment is 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. Sac. County,* 94 U. S. 352, 24 L. ed. 197." (Emphasis added.)

Bates v. Bodie, 245 U. S. 520, 525, 62 L. Ed. 444, 449.

The point made here is fully sustained also by the declaration made by this Honorable Court in *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 88 L. Ed. 149, quoted as follows:

> ". . . so that a cause of action merged in a judgment in one state is likewise merged in every other." (P. 439; 88 L. Ed. 155.)

As to he presentation of property settlement and separation agreements to Courts in divorce proceedings for adjudication the rule is well stated in *Holloway v. Holloway,* 130 Ohio St. 214; 198 N. E. 579, where the Court found that the obligation for support allowances was on the decree and not upon the agreement providing for same, following the presentation of the agreement to the Court in the divorce proceedings for determination.

We quote therefrom, starting at page 580:

> "A decree is valid as such regardless upon what it may be grounded. *There is nothing in the law to render a decree invalid or ineffectual merely because it was predicated upon an agreement of separation, which agreement is incorporated bodily in the decree. A decree which incorporates an agreement is a decree of court nevertheless* and as soon as incorporated into the decree *the separation agreement is superseded by the decree and the obligations imposed are not those imposed by contract but are those imposed by decree and enforceable as such. Once the contract is merged into the decree, the value attached to the separation agreement is only historical."* (Emphasis added.)

The following State Court cases declare the same rule:

Adler v. Adler, 373 Ill. 361, 26 N. E. (2d) 504 (cert. den. 311 U. S. 620);

Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820;

Warren v. Warren, 116 Minn. 458, 133 N. W. 1009;

Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580;

Worthington v. Worthington, 224 Ala. 237, 139 So. 334;

Prime v. Prime, 172 Ore. 34;

Hough v. Hough, 26 Cal. (2d) 605, 160 P. (2d) 15;

Schwartz v. Dunham, 52 Ariz. 256, 80 P. (2d) 453.

POINT VI.

Under the Laws of Utah the Sums Described in the California Judgment Are a Money Judgment Enforceable as Such in Utah by Execution.

Utah has expressly so held. We quote the words of its Supreme Court:

> "By the weight of authority, and we think the better reason, although there are cases to the contrary, *a decree for alimony,* in a gross sum *as well as to past due and unpaid installments stands upon the same footing as ordinary money judgments and may be enforced by execution* in the same manner as ordinary money judgments may be enforced."
>
> *Beesley v. Badger,* 66 Utah 194, 199.

POINT VII.

The Provisions of the "Property Settlement and Separation Agreement for Weekly Installments Payable to and "for the Support of the Wife," Was a Severable One in the Nature of Alimony.

It has been definitely determined that when payments described in a property settlement and separation agreement are described as being for the "support" of the wife that such payments are alimony. The authorities appear to be unanimous in holding that sums for the support of the wife are alimony and that alimony is money allowed for the support of the wife.

In re Spencer, 83 Cal. 460;

Davis v. Davis, 61 Okla. 275, 161 Pac. 190-191;

Phy v. Phy, 116 Ore. 31, 236 Pac. 751;

Kutchai v. Kutchai, 223 Mich. 569;

Lynde v. Lynde, 64 N. J. Eq. 736.

"Maintenance" (support) and "permanent alimony" are synonymous and constitute an allowance in money for support of innocent party.

Phy v. Phy, 116 Ore. 31, 236 Pac. 751, 752, 42 A. L. R. 558;

Gilbert v. Hayward, 37 R. I. 303.

The Supreme Court of Oregon has been called upon recently to determine the effect of an agreement of the parties, providing for a division of property rights and for the payment of future installments for maintenance. The Supreme Court after stating that "An agreement of the parties *approved as fair in the divorce decree* may

provide for a division of property rights and also for the payment of future installments for maintenance" then declared:

> *"Although both provisions be included in the same instrument they may be treated as separable,* the provisions for the division of the property being binding and beyond the power of the Court to modify, *the provisions concerning future installments for maintenance being, however, subject to modification in the event of changed conditions.* The many authorities cited can be explained on no other theory than that the executory provisions *are to be deemed separable* from the provisions relative to a division of the property. As to the executory provisions, the parties are deemed to have contracted in view of the statute authorizing modification thereof." (Emphasis added.)
>
> *Prime v. Prime,* 172 Ore. 34, 49, 50, 139 P. (2d) 550.

POINT VIII.

The Common Law Rule That the Obligation to Pay Alimony Terminates Upon the Death of Either Husband or Wife Is Not the Law of Utah and the California Court Has Construed the Utah Decree Under That Common Law Rule.

The rule at common law has recently been stated by the Supreme Court of Washington as follows:

> "Under the rule at common law, the obligations to pay alimony is regarded as a personal one and terminates upon the death of either husband or wife. . . . (Citing cases.)"
>
> *Murphy v. Shelton,* 183 Wash. 180, 48 P. (2d) 247.

The rule in Utah has been declared by its Supreme Court as follows:

> ". . . the court may make such order respecting the property and the support and maintenance of the wife and children, as is just and equitable, *and such order or decree may be made to continue in force after his decease.* . . ."
>
> *Murphy v. Moyle*, 17 Utah 113, 120, 53 Pac. 1010.

The rule there stated was noted with approval in *Beesley v. Badger, et al.*, 66 Utah 194; and the Utah Supreme Court construing Sections 3-5, Title 40, Utah Code (C. L. 17, Sec. 3000) in *Cody v. Cody*, 47 Utah 456, 463, said:

> "The legislature in adopting this section intended to, and did, enlarge the common law powers of our courts . . . in divorce proceedings."

What was said there is noted as being very similar to what was said by the Supreme Court of Washington, immediately following the foregoing statement of the rule at common law. We quote as follows:

> "This rule has been modified by statute in many States so that now, generally, *the courts have the power to provide in their decrees that alimony shall continue after the death of the obligor and be payable out of his estate.*" (Emphasis added.)
>
> *Murphy v. Shelton*, 183 Wash. 180, 48 P. (2d) 247.

The rule, however, as stated by the California Court, in construing the Utah decree is the common law rule which it states as follows:

> "The legal obligation imposed by law to support the wife by the payment of permanent alimony comes to an end upon the death of either party." (R. 91.)

California courts have evidently made a practice of so holding.

Roberts v. Higgins, 122 Cal. App. 170, 9 P. (2d) 517.

See, also, *Prime v. Prime,* 172 Ore. 34, 51, 53, 139 P. (2d) 550, where, as seen by the Supreme Court of that State, the conflict between the states on this question discloses California and New York on one side and Utah, Massachusetts, West Virginia, Minnesota, Michigan and Washington on the other.

It would appear that what this Honorable Court has said in *Riley v. New York Trust Company,* when speaking of the Full Faith and Credit Clause, should be controlling here. We quote as follows:

> "That clause compels that controversies be stilled so that where a state court has jurisdiction of parties and subject matter, *its judgment controls in other states to the same extent that it does in the state where rendered.*"
>
> *Riley v. New York Trust Co.,* 315 U. S. 343, 349, 86 L. Ed. 885, 891.

It has been held that courts cannot alter, amend or repeal judicial proceedings of another state without violating the provisions of that clause.

Dry v. Rice, 147 Va. 331, 137 S. E. 473.

Also, that the construction and interpretation of a judgment are governed by the law of the state where rendered.

In re National Surety Co., 284 N. Y. 593 (cert. den. 311 U. S. 707, 85 L. Ed. 859).

POINT IX.

The Utah Decree Is Res Adjudicata Not Only as to All Matters Litigated Therein but as to All Matters That Could Have Been Litigated Therein.

As shown herein under "Point V" this Honorable Court has so held upon facts very similar to the facts here. The rule as declared in *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, has been set forth under that point at length.

This Honorable Court, has, however, so recently restated the rule in *Heiser v. Woodruff* that it may not be improper to direct attention to that case.

We quote as follows:

> "In general a judgment is *res adjudicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but are not raised and litigated in the suit."
>
> *Heiser v. Woodruff,* 326 U. S. 726, 735, 90 L. Ed. 970, 977.

Conclusion.

For the reasons stated it is clear that the Courts of the State of California have failed to give to the divorce decree obtained by your petitioner in Utah, the full faith and credit required by the provisions of Article IV, Section 1, of the Constitution of the United States, and that the effect of the judgment of the California Court is to deny right guaranteed to him by the provisions of the Fourteenth Amendment to that Constitution. The observation made by this Honorable Court in *Harding v. Harding,* 198 U. S. 317, 49 L. Ed. 1066, 1075, that if the ". . . California law is as asserted, the proposition of

fact upon which the argument rests amounts simply to denying all effect to the Illinois decree," would appear to be fully applicable to the facts here, and calls for here, as there, the exercise of the supervisory control of this Honorable Court.

It is respectfully submitted that, not only in the interest of the general welfare, but in order that the will of the People of the United States as set forth in the Constitution but not only observed but respected and obeyed, a writ of certiorari should be granted in order that this Honorable Court might review the judgment of the District Court of Appeal of the State of California, Second District, Division One, and reverse such judgment.

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